In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Chapter 13 Case
KENDALL DAVID JAMES	)	
a/k/a David James	)	Number 98-20139
	)	
Debtor	)	
	)	
	)	
BUDDY NESMITH	)	
BEVERLY NESMITH	)	
	)	
Movants	)	
	)	
v.	)	
	)	
KENDALL DAVID JAMES	)	
and SYLVIA FORD BROWN,	)	
Chapter 13 Trustee	)	
	)	
Respondents	)	

MEMORANDUM AND ORDER
ON MOTION TO DISMISS

Debtor filed a Chapter 13 petition in this Court on July 7, 1997. That case was dismissed for failure to make payments to the Trustee on December 10, 1997. Debtor then filed the present case on February 4, 1998. Buddy and Beverly NeSmith filed a Motion to Dismiss on April 23, 1998. A hearing was held on the Motion to Dismiss on

June 9, 1998.[1] The parties submitted evidence and have briefed the issue. Pursuant to Bankruptcy Rule 7052, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor, although represented by counsel, did not appear at the hearing on the Motion to Dismiss. The Court heard argument from counsel and testimony from Buddy NeSmith and Larry Bryson.

On September 23, 1996, the NeSmiths hired Debtor as the general contractor to conduct repairs to their house, which had been struck by lightning. On the same date, the NeSmiths and Debtor signed a standard contract used by Larry Bryson, the architect hired to oversee the project. The contract provided that Debtor was to complete the project on or before December 23, 1996, or liquidated damages of $125.00 per day would be assessed.

Mr. Bryson testified that the contract required Debtor to submit an application and certificate for payment to receive progress payments. He was required to provide a detailed list showing specifically how the money disbursed for each progress payment was allocated for the subcontractors. Each time Debtor applied for a progress payment, he signed a written statement that all amounts applied for in previous

[1] The NeSmiths, through counsel, also appeared at Debtor's confirmation hearing on July 7, 1998, and reiterated their objection to confirmation on these same grounds.

applications were disbursed as allocated.

As construction on the project progressed, the NeSmiths became concerned that Debtor was not using the progress payments to pay sub-contractors. Several of the sub-contractors complained to Mr. NeSmith and Larry Bryson about not being paid. In an effort to avoid problems with the sub-contractors, and to protect the property from liens, Mr. NeSmith began issuing two party checks. In response, Debtor stopped coming to work. Larry Bryson attempted to get Debtor to complete the project; however, these attempts failed and Mr. NeSmith hired other individuals to complete the remaining work.

Shortly after Debtor left the project, several of the sub-contractors contacted Mr. NeSmith concerning amounts that they were owed. Specifically, Bradham Cabinets, Tropical Stucco, and Choo-Choo Build-it Mart demanded payment from the NeSmiths. The NeSmiths never contracted with these companies, and any money owed was the responsibility of Debtor. The progress payment applications and the testimony of Larry Bryson establish that money allocated for specific areas of the project were paid to Debtor, but he failed to tender it to these subcontractors. Mr. Bryson and Mr. NeSmith both testified that they did not know what Debtor did with the money. Because Debtor did not appear at the hearing, their testimony is unrefuted that he failed to apply progress payments to debts arising on this contract.

On July 17, 1997, Debtor filed his first petition under Chapter 13 of the Bankruptcy Code. The schedules and mailing matrix filed with this first petition did not include a number of creditors. On August 28, 1997, after Debtor's attorney was contacted concerning the omissions, a motion was filed to add nine additional creditors. *See* Motion to Add Creditor, Ch.13 No. 97-20864.

In addition to leaving out a substantial number of creditors, Debtor failed to list all of his assets. He stated that he used his father's truck as a means of transportation and did not own a vehicle. (Ch. 13 No. 97-20864, Schedule B). He also indicated that he did not own any real property. (Ch. 13 No. 97-20864, Schedule A). He affirmed under penalty of perjury that he had read all of the schedules and they were true and correct. (Ch. 13 No. 97-20864, Declaration concerning Debtor's Schedules). In addition to signing the schedules, Debtor made the same representations under oath at the meeting of creditors.

On November 24, 1997, the NeSmiths, by and through their attorney, filed an objection to confirmation based on the Debtor's failure to make his promised payments and because he had intentionally omitted important information relevant to the bankruptcy estate. (Case No. 97-20864, Doc. #16). At the confirmation hearing on December 10, 1997, he failed to appear and his case was dismissed for failure to make payments. At the time of dismissal he had only paid $300.00 into the plan, leaving a

deficiency larger than the amount paid. (Case No. 97-20864, Doc. #19).

On February 4, 1998, Debtor filed the within Chapter 13 petition. The allegations contained in the NeSmith's November 24 objection concerning missing information were proven true. In the current petition Debtor has admitted to owning an unencumbered 1988 Corvette automobile worth approximately $15,000.00. (Case No. 98-20139, Schedule B). Debtor also indicates in the current petition that he owns a home worth approximately $180,000.00. (Case No. 98-20139, Schedule A). When questioned by the Chapter 13 Trustee concerning these items, he testified that he owned these items during the previous case and he offered no explanation as to why these items were not listed. (Doc. #9).

In addition to the above, the budget in Debtor's current petition reflects expenses of $1,513.00, almost $500.00 more than in the previous case. When questioned at the Section 341 meeting, Debtor testified that he had not undergone any changes in lifestyle and offered no explanation why his expenses were almost fifty percent higher. Debtor is self-employed and requested that he be allowed to make his monthly payment direct to the Trustee. He was instructed to provide monthly operating reports; however, he has been in Chapter 13 for four months and has not provided a single report. He has also tendered only two of four payments which have come due since filing. *See* Trustee's Exhibit A, Doc. #25.

On May 26, 1998, the NeSmiths filed a proof of claim in the current case in the amount of $34,395.02, the same amount filed in the previous Chapter 13 case. To date, Debtor has not objected to the NeSmith's proof of claim. On April 23, 1998, the NeSmiths filed this Motion to Dismiss based on the foregoing facts and circumstances.

CONCLUSIONS OF LAW

A. Dismissal for Cause Pursuant to Section 1307(c)

Based on the totality of the circumstances test, the within petition for relief filed by Debtor On February 4, 1998, was not filed in good faith and should be dismissed with prejudice. "[T]he court . . . may dismiss a case . . . in the best interests of creditors and the estate, for cause." 11 U.S.C. § 1307(c). The first question is what constitutes sufficient cause to dismiss a case. This Court has held that a debtor's failure to file a case in good faith is sufficient cause to grant a dismissal. In re Young, Ch.13 No. 92-41720, slip op. at 8 (Bankr. S.D.Ga., April 19, 1993) (Davis, J.); *See also* In re Love, 957 F.2d 1350 (7th Cir. 1992).

In evaluating whether a petition was filed in good faith, this Court must determine what constitutes good faith and what type of evidence is relevant to the inquiry. This Court has adopted a totality of the circumstances test for determining good faith. Young, Ch. 13 No. 92-41270. For purposes of evaluating a Chapter 13 plan, the Eleventh Circuit has stated that "a comprehensive definition of good faith is not practical[;]"

however, "the basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit [of the Bankruptcy Code]." In re Kitchens, 702 F.2d 885, 888 (11th Cir. 1983). While a precise definition of good faith may not be possible, the Eleventh Circuit announced that bankruptcy courts should consider the following factors in making a determination as to good faith, to wit:

1) the amount of the debtor's income from all sources;

2) the living expenses of the debtor and his dependents;

3) the amount of attorney's fees;

4) the probable or expected duration of the debtor's Chapter 13 plan;

5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;

6) the debtor's degree of effort;

7) the debtor's ability to earn and the likelihood of fluctuation in his earnings;

8) special circumstances such as inordinate medical expense;

9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors;

10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;

11) the burden which the plan's administration would place on the trustee;

12) consideration of the type of debt to be discharged; and

13) amount of repayment to unsecured creditors.

Id. at 888-889.

This Court has held that the same factors announced in Kitchens should be used to evaluate whether a petition was filed in good faith; however, the inquiry should be broader when examining the filing of a petition than when examining only the plan. Young, slip op. at 9. Essentially, the court's inquiry is "whether the filing is fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions?" Love, 957 F.2d at 1357.

In deciding whether a case was filed in good faith, the Court can consider all relevant evidence, including pre-petition conduct and the credibility of the debtor. The totality of the circumstances test requires that the Court examine evidence outside the current petition. If the court cannot look beyond the current petition, factors such as the debtor's motivations, the debtor's degree of effort, the frequency of filing, and the circumstances under which the debt was incurred would not have any meaning. Moreover, though not specifically addressing the issue, numerous courts have looked to pre-petition conduct in deciding whether a petition was filed in good faith. *See* In re

Love, 957 F.2d 1350, 1359 (court looked at debtor's conduct of not filing tax returns and his involvement with tax protest group prior to filing as sufficient cause for dismissing case); In re Jeffries, 1995 WL 12288, *2 (N.D.Ill. 1995) (debtor's prior bankruptcy petitions were reviewed in analyzing whether current petition was filed in good faith); In re Bayer, 210 B.R. 794 (8th Cir. B.A.P. 1997) (" . . . bankruptcy court properly considered Debtor's pre-petition conduct in the good faith analysis").

To hold otherwise would encourage debtors to attempt to mislead and defraud creditors. If the Court does not look beyond the current petition, a debtor could falsify his schedules and lie to the Court, and if caught he would need only dismiss the case and start over on a clean slate. This Court will not adopt a position that allows a debtor to commit fraud and suffer no sanctions.

Debtor contends that evidence from the meeting of creditors is inadmissible in this proceeding. The argument is based on 11 U.S.C. § 341(c), which precludes the court from attending or presiding at the meeting of creditors; however, this section does not preclude the Court from considering, in a later hearing, relevant evidence produced in that meeting. *See* In re Jost, 136 F.3d 1455, 1469 (11th Cir. 1998) (failure of bankruptcy court to "consider as substantive evidence [debtor's] testimony at the Section 341 Meeting" was grounds for remand). The prohibition of a judge attending the meeting of creditors is designed to insure his impartiality if called upon at a later hearing

to adjudicate issues raised at the meeting. Bankruptcy Rule 2003 also provides the meetings held under Section 341 shall be recorded and made public record for at least two years. If the Court cannot consider testimony from the 341 meeting, there would be no need to record the hearing or make it available to the public. I therefore hold the proceedings of the Section 341 Meeting to be admissible.

Using the factors outlined in Kitchens, the facts in this case establish that Debtor did not file this petition in good faith. First, there is conclusive evidence that Debtor misstated facts concerning his assets and income in his first case while under oath. The next factor that supports dismissal is the amount of Debtor's income from all sources. It is undisputed that Debtor attempted to hide assets and income in the previous case. It is also undisputed that Debtor was recently married and has failed to amend the required schedules as to additional household income or expenses. He testified at his 341 meeting that he did not know why the expenses in the present case were $500.00 a month more than they were just seven months before. Finally, he has failed to file monthly operating reports which are required of all self-employed debtors to detail their current income and expenses.

Debtor's motivation and his lack of sincerity in seeking relief under the provisions of Chapter 13 also support dismissal of his case. He exhibited little effort in attempting to prosecute the past or current plan. His first case was dismissed in

December of 1997 for failure to make his payments, after paying only $300.00 into the plan. In the current case he has $17,389.29 secured debt, $10,676.54 in priority debt, and $127,296.31 in unsecured debt for a total of $157,312.14. Even with a minimum ten percent dividend, Debtor would have to pay $837.00 per month to fund an acceptable plan. As proposed, however, the plan provides for payments of only $525.00 per month. Additionally, the plan fails to take into account the liquidation value of the unencumbered Corvette sports car (fair market value of $15,000.00). Debtor therefore failed to propose a good faith level of funding to his plan.

Since filing the first case in July of 1997, over a year ago, Debtor has paid less than $1,400.00 to the Chapter 13 Trustee, most of which went to, or is earmarked, for filing fee and attorney's fees. In the current case, Debtor has already missed two payments, is not providing monthly operating reports, and did not attend the hearing on the within Motion to Dismiss. All of these facts establish that Debtor has made little effort to succeed in Chapter 13.

Another factor that serves to establish the lack of good faith is the number and frequency of times that Debtor has sought bankruptcy relief. The current case is Debtor's second Chapter 13 case and comes on the heel of a case dismissed for woefully inadequate performance as set forth previously.

Nothing in the record suggests that Debtor has acted in any manner other than in bad faith. He has attempted to misuse the bankruptcy system, has made little effort to abide by the rules of bankruptcy, and has attempted to delay and defraud legitimate creditors. In short, he has attempted to abuse the provisions, purpose and spirit of the Bankruptcy Code and his case should be dismissed.

B. Dismissal for Prejudice Pursuant to Sections 349(a) or 109(g)

Once this Court makes a determination that Debtor did not file the within petition in good faith, Section 1307(c) gives this Court authority to dismiss the case. The Court must then turn to Section 349(a) to determine the consequences of such a dismissal. That section provides as follows:

> (a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a latter case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

Several courts have considered the provisions of Section 349(a) and have held that the negative implication contained therein gives the courts the power to prevent future filings or to declare existing debts nondischargeable in any future proceeding. *See* In re Tomlin, 105 F.3d 933 (4th Cir. 1997) (Court has authority to dismiss with prejudice if filed in bad faith); In re Leavitt, 209 B.R. 935 (9th Cir. B.A.P. 1997) (debtor's burden to prove good

faith very heavy because of "super-discharge"); In re Robertson, 206 B.R. 826 (Bankr. E.D.Va. 1996) (case dismissed for length of time creditor was delayed); In re Faulkner, 187 B.R. 1019 (Bankr. S.D.Ga. 1995).

The courts that have utilized the sanction available under Section 349(a) have adopted two separate dismissal options. In re Tomlin, 105 F.3d 933, 937. Some courts have ruled that a case dismissed with prejudice results in all then-existing debts being declared nondischargeable. Other courts have ruled that a dismissal with prejudice precludes a debtor from refiling for a period of time, which time period is determined by the particular facts of each case. Id. At least one court has barred refiling for two years without prior permission of the court. In re Gros, 173 B.R. 774, 777 (Bankr. M.D.Fla. 1994).

The abuse of the bankruptcy process in this case warrants severe response. Debtor has arguably committed perjury. He has failed to make monthly payments, he has failed to submit monthly operating reports, he has attempted to hide assets, and he has failed to attend hearings before this Court. These reasons amount to more than sufficient cause for this Court to dismiss his case on bad faith grounds and under Section 109(g). To declare all debts existing at the time of commencement of this case nondischargeable without notice, however, would be inappropriate.

Imposition of Section 349 has been termed the "capital punishment of bankruptcy." Tomlin 105 F.3d at 937. It has the same effect as denial of discharge under 11 U.S.C. § 727, which requires an adversary proceeding, issuance of a summons, and notice and a hearing on the claim asserted. The NeSmiths' motion to dismiss and objection to confirmation did not expressly give notice that the creditor would seek the "death penalty" in this case. I therefore hold that it is not an option for the Court. With sufficient notice of the remedy being sought, however, it could have been appropriate on these facts.

Recognizing that denial of discharge is not an available remedy, the question remains whether Debtor can be barred from refiling for longer than 180 days. It is difficult to conceive of how any future Chapter 13 case of this Debtor would not be subject to dismissal on the same grounds as this one. However, without prior notice of the possibility that a bar longer than six months might be ordered, I will not at this time extend the period of disqualification. Given adequate notice, however, an order denying future Chapter 13 relief might be an appropriate remedy, while reserving to Debtor the right to seek Chapter 7 relief, under which chapter there is no "super discharge."

There remain more than sufficient grounds for dismissing this case with prejudice, pursuant to Section 109(g). That section provides that no individual may be a debtor for 180 days if a previous case was dismissed "by the court for willful failure of

the debtor to abide by orders of the court, or to appear in proper prosecution of the case." 11 U.S.C. § 109(g).

The facts in this case present grounds for dismissal with prejudice. Debtor has willfully failed to prosecute his case and to comply with the requirements of the Code. He failed to amend his schedules to reflect his current household budget, has not filed the required monthly operating reports, and has failed to make half of his proposed monthly payments. The proposed payments would be insufficient to support confirmation even if made. He has acted in bad faith as discussed in this Order. Debtor also failed to appear in proper prosecution of his case by not attending the hearing on the Motion to Dismiss, just as he failed to attend the confirmation hearing in his prior case.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion to Dismiss is granted. Debtor is barred from refiling, pursuant to 11 U. S. C. Section 109(g) for a period of 180 days.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1998.